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In the Supreme Court of the United States

October Term, 1950 - - - - Number 258

DEAN MILK COMPANY, a corporation,

Appellant,

vs.

CITY OF MADISON, WISCONSIN, a Municipal Corporation, DR. C. K. KINCAID, as Health Commissioner for the City of Madison, Wisconsin, LEONARD HOWELL, as City Manager of the City of Madison, Wisconsin, and THE COMMON COUNCIL OF THE CITY OF MADISON, WISCONSIN,

Appellees.

Appeal from the Supreme Court of the State of Wisconsin.

APPELLEES' BRIEF

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brief.)

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APPELLEES' BRIEF

OPINION OF THE COURTS BELOW

The opinion of the Supreme Court of the State of Wisconsin is reported in 257 Wis. 308, 43 N. W. (2nd) 480, and

is set forth in the Record at pages 290-296. The opinion of the Circuit Court for Dane County is not officially reported, but is found in the record at pages 1-18.

STATEMENT OF THE CASE.

Although the "Statement of the Case" contained in the appellant's brief contains a great deal of material which is argumentative, we do not consider it necessary to discuss that material in detail. We propose briefly to set forth the basic facts involved in the case.

The action is an action for declaratory judgment in which the appellant has sought to have the Court declare that Sections 7.21 and 7.11 of the General Ordinances of the City of Madison, Wisconsin, are invalid under the Interstate Commerce clause in Section 8 of Article I of the United States Constitution, and under the 14th Amendment to the Constitution. The action was tried upon the second amended complaint of the appellant (R. 19-33) and the answer of the appellees thereto. (R. 33-51) At the conclusion of the trial, the Circuit Court for Dane County, Wisconsin, issued its decision that Section 7.21 of the Ordinances, being the five mile pasteurization limit, is constitutional, and that there was no justiciable controversy between the parties as to Section 7.11 of the Ordinances, which provides that the Madison Health Department shall not be obligated to inspect farms located more than twenty-five miles from the City of Madison. (R. 1-19) The basis of the trial court's decision on Section 7.11 was that since the appellant had not contemplated pasteurization within five miles from the city and the court had upheld the five mile pasteurization limit, there was no justiciable controversy, and on the further ground that the

appellant owned no farms which could be affected by the Ordinance. Appropriate Findings of Fact and Declaratory Judgment upholding Section 7.21 and dismissing the complaint as to Section 7.11 was entered in the trial court. On appeal the judgment of the trial court was affirmed by the Wisconsin Supreme Court.

The City of Madison is in the center of Dane County which contains over 5600 farms and produced in 1948 over 640,000,000 pounds of milk. (R. 117 and Ex. 40, R. 197) This is more than ten times the milk used annually in the City of Madison. Large quantities of milk are shipped from Dane County to the Chicago fluid milk market and large quantities are made into cheese, butter, evaporated milk, etc. The area within a radius of 25 miles from the Capitol Square in the City of Madison includes practically all of Dane County and portions of adjoining counties. At present Madison's pasteurized milk is furnished from about 500 farms of which about 60% are located within 10 miles of Madison and the balance within 20 miles. (R. 118) Since at least 1926 all Madison's milk has been supplied from farms within twenty miles of the city. (R. 118)

There are several distributors of milk in Madison, all of whose plants are located within five miles of the Capitol Square: (1) The University of Wisconsin has its own plants for pasteurizing and supplying milk to University Halls and Commons; (2) Rennebohm Farm supplies only the various Rennebohm Drug Stores and does not supply all of the stores' needs; (3) There are three retail and wholesale dealers, the Borden Company, Bancroft Dairy and Bowman Farm Dairy supplying the city. (R. 119-122)

All producers delivering on the Madison market are licensed by the Madison Health Department and are inspected by representatives of the Health Department as

well as by representatives of the dealers and of the Co-operative Association representing the farmers.

Appellant is a Chicago corporation which operate several plants in Illinois. It operates two pasteurization plants located at Chemung and Huntley, Illinois, 65 and 85 miles from Madison, in which it pasteurizes and bottles milk which is labeled "Grade A" milk under the City of Chicago milk ordinances. (R. 8) Its Chemung plant is supplied by about 1150 farms, and its Huntley plant by about 1075 farms. (R. 87) The farms are located in an area about 20 to 25 miles around the plants. (R. 84) It also operates three plants processing other than Grade A milk. The farms supplying milk to appellant and its plants are licensed by the Board of Health of the City of Chicago. They are inspected by representatives of the Chicago Health Department. (R. 80, 84, 85)

The appellant sells pasteurized milk in Chicago and various other cities in Illinois and its milk is sold in some Wisconsin communities. It desires to sell pasteurized milk bottled at its Huntley or Chemung plants to a distributor, Mr. Robert Alder, who will purchase the appellant's milk in Illinois and then proposes to sell it in the City of Madison. (R. 103)

In March, 1948, the appellant applied to the Madison Board of Health for a license to sell in Madison milk bottled in Illinois. The license was refused because the plants were beyond the 5 mile pasteurization limit of the Madison ordinances. On October 1, 1949, a few days before the trial of this action, the appellant applied for 950 Madison farm permit application blanks, but they were not furnished by the Madison Health Department for two reasons: (1) The City did not have that many blanks available, and (2) As testified by Dr. Kincaid, the City Health Commissioner, this action was pending on the validity of the five-mile pasteurization limit and until determination

of that question there was no point in having any Dean producers apply for permits. (R. 69) The Dean Company does not intend to pasteurize within the five-mile limit, but wishes to sell milk in Madison which has been pasteurized and bottled in its Illinois plants. The Dean Company does not own or operate any farms.

There is nothing in the record indicating what action the Madison Health Department would take on any applications for permits by Dean's Illinois producers if the milk were to be pasteurized within five miles of the Capitol Square in Madison, or if the five mile pasteurization should finally be held invalid.

Reference is made in this case to three separate milk ordinances. The Madison milk ordinances are a complete regulation of the production, processing and delivery of milk sold in the City of Madison, and of the milk itself. (R. 237-273)

The five-mile pasteurization limit contained in the present Section 7.21 of the Ordinance was adopted as part of the city's general milk ordinances in 1930, and was retained in a general revision of those ordinances which was effective August 27, 1949. The present Section 7.11 of the Ordinances (125 mile farm inspection provision) was first enacted as part of the revision of August 27, 1949. The standards and requirements of the Madison ordinances are basically those of the U. S. Public Health Service suggested ordinance hereafter referred to, with, however, some additional requirements, and with the five-mile pasteurization limit in Section 7.21 used instead of Section 11 of the U. S. Public Health suggested ordinance, which is the so-called "reciprocal inspection" section of that suggested ordinance.

The appellant now is producing and processing under the provisions of the City of Chicago milk ordinances. The record shows (R. 130-135) that the requirements of the

Madison ordinances are in some respects more rigid than those of the Chicago ordinance.

The third ordinance is that suggested by the U. S. Public Health Service to municipalities for adoption by the municipalities. It is contained in Public Health Bulletin No. 220, 1939 edition, issued by Federal Security Agency, and is largely set forth in the record at pages 161-193. Many of its provisions are found in the milk ordinances both of Chicago and of Madison, but not all of it is found in either ordinance. Section 11 of this suggested ordinance is the so-called "reciprocal inspection" provision thereof. At the time of the trial of this case, an amendment of the suggested ordinance was in process, and Section 11 as amended is found in Exhibit 2 of the Record, page 195. The amended Section 11 provides as follows:

> "Section 11. Milk and milk products from point beyond the limits of routine inspection.—Milk and milk products from points beyond the limits of routine inspection of the municipality of ..... may not be sold in the municipality of ....., or its police jurisdiction, unless produced and or pasteurized under provisions which are substantially equivalent to the requirements of this ordinance and which are enforced with equal effectiveness as determined by a milk sanitation rating."

SUMMARY OF ARGUMENT.

The issue in this case is whether the power to regulate and control fluid milk supplies for the protection of public health by reasonable regulations, shall be denied to local governments. While professing to attack the Madison five-mile pasteurization limit, appellant is, in fact attacking

the present system of local fluid milk regulation for the protection of public health.

I.

The pre-milk pasteurization limit at Section 7.21 of the Madison ordinances is valid under the Fourteenth Amendment to the United States Constitution as a reasonable non-discriminatory exercise of the city's police powers for protection of public health.

The differences between the parties in this action involve the question of local autonomy, within reasonable limits, to adopt and maintain fluid milk standards and the enforcement thereof by local licensing and inspection.

The appellee City of Madison maintains that a municipality in the absence of contrary state law may fix its own fluid milk standards, so long as they are reasonable; may require its own inspection of milk supplies and its own licensing and inspection of all farms and plants which produce and process the milk; hence it may take reasonable steps, such as the ordinance involved herein, to make its enforcement more efficient, and convenient.

The appellant denies these municipal powers by claiming that any fluid milk standards more rigid than those suggested as *minimum* standards by the United States Public Health Service in its suggested ordinance are *ipso facto* unreasonable; that a municipality must accept licensing and inspection of farms and plants by other municipalities on the basis of the "reciprocal inspection" provisions of Section 11 as amended of the United States Public Health Service suggested ordinance.

This Court and courts throughout the country have recognized that fluid milk, because of its importance as food and its perishability and capacity for carrying disease, is properly subject to special minute and rigid municipal regulations which may be drastic restrictions on private business. So long as local fluid milk regulations are not palpably unreasonable or arbitrary, the courts do not interfere with the legislative discretion in the means adopted in such health regulation.

The Madison five-mile pasteurization limit is a reasonable, non-discriminatory fluid milk regulation for the protection of public health. The Record shows that the pasteurization limit was not enacted as any trade barrier or to prevent competition or to protect any interests other than the public health of the City's citizens. The ordinance does not restrict private business any more than any other rigid milk requirement.

Acceptance of appellant's arguments which are basic to its position in this case would prohibit the adoption and maintenance of any municipal milk standards or enforcement provisions more rigid than the standards suggested as minimum by the United States Public Health Service. Madison's fluid milk standards are in fact higher than those of Chicago which govern appellant's milk; whether these higher standards are reasonable has not been involved in or determined by this case. Appellant's contention would destroy these higher standards without regard to whether they are reasonable.

Appellant's argument that "wholesome" milk must be accepted by any community would lead to a break-down of all local milk regulations and would require acceptance of milk regardless of compliance with the local reasonable regulations.

Appellant's contentions would deprive municipalities of power to require their own inspection and supervision of

their milk supplies and would require acceptance of inspection by other municipalities even though such other inspection is considered inadequate.

Congress has recognized the right of localities to license and inspect all sources and suppliers of milk by requiring that all milk shipped into the District of Columbia for fluid milk sales shall be from sources and suppliers licensed and inspected by the District of Columbia health officer.

The United States Public Health Service milk-shed rating system is not an inspection system. It does not include any complete inspection of an entire milk-shed by federal or even state personnel. It is merely a "spot-check" method for occasionally rating the local enforcement on a particular milk-shed to determine average conditions on the milk-shed. The rating of the Chicago milk-shed at more than 90% is not a rating of any given dealer's milk-supplying farms or plants, none of which were necessarily inspected in arriving at the over-all milk-shed rating.

The refusal of a city to rely on such rating of a milk-shed in acceptance of milk from that milk-shed pursuant to the "reciprocal inspection" system suggested by United States Public Health Service in section 11 of its suggested ordinance is neither unreasonable nor arbitrary.

The health problems of meats, vegetables, etc., are not comparable to those of milk. Meat control and inspection does not require the detailed regulation and consistent inspection of farm premises and operations that are required for milk. Hence regulation and inspection which might be unreasonable for meat is entirely reasonable and necessary for milk. Cases dealing with meats are therefore not pertinent to the problems of milk.

The State of Wisconsin has not in any way adopted United States Public Health standards or system for its localities. General Order 125 of the Wisconsin Depart-

ment of Agriculture is an entirely voluntary program for the sales promotion of milk to out-of-state markets which may choose to rely upon the services provided under the order.

None of the state court cases cited by the appellants is relevant to the Madison ordinance situation. All those cases involved either state wide systems of milk regulation and inspection or other facts or state laws not present in the Madison situation. Courts in New York, California and Texas have upheld ordinances similar to the Madison ordinance.

Since the City of Madison has right to fix its own reasonable standards and to license and inspect plants and farms the five-mile pasteurization limit is a reasonable and non-discriminatory method of enforcing these requirements and hence does not violate any provisions of the Fourteenth Amendment.

II.

The five-mile pasteurization limit is not invalid under the Interstate Commerce Clause of the United States Constitution.

This Court has recognized the validity of local health regulations which may affect interstate commerce in areas where uniform national regulation is not required and where Congress has not acted to establish nation-wide regulation.

The Madison ordinance was neither designed to, nor does it operate to, discriminate against interstate commerce in any way. All persons, whether doing business intrastate or interstate, are equally subject to the ordinance. The ordinance does not prohibit interstate commerce.

Congress has not attempted any regulation of milk in interstate shipment. It has left the field to local action as is specifically shown by the statutes regulating introduction of fluid milk into the District of Columbia. Any federal uniform regulation of fluid milk would be impractical. It would require not only federal inspection of milk and milk plants but also frequent inspection of hundreds of thosands of individual producing farms.

Local action to regulate and control milk for fuild consumption being within the power of local governments and the Madison ordinance being a reasonable and non-discriminatory regulation, the ordinance is not invalid under the Interstate Commerce Clause.

III.

The state courts properly refused to pass upon the validity of section 7.11 of the Madison ordinances, being the twenty-five miles inspection provision.

There was no justiciable controversy between the parties to this action concerning section 7.11 because the five-mile pasteurization limit of section 7.21 of the ordinances was upheld and the appellant does not propose to pasteurize its milk within the permitted area.

The Madison Health Department has taken no action and has adopted no policy concerning licensing or inspection of the farms supplying appellant's milk in Illinois and has not stated what its position would be if there were no five-mile pasteurization limit.

There has been no determination by any court in this action of any rights of appellant or of any other person under section 7.11 of the Madison ordinance. Nothing in

this action would prevent such a determination in the future upon the suit of any proper party.

ARGUMENT.

This case is of importance to the entire question of the protection of public health through regulation and control of milk sold throughout the nation for consumption as fluid milk. It involves the right of local governments—states and municipalities thereof—to establish and maintain their own health standards for, and control over, milk sold for consumption within areas of their police jurisdiction. Here, for the first time in this Court, claim is made that such local governmental units should be deprived of their autonomy in the reasonable regulation of such milk for the protection of the health of their citizens. Appellant claims that every locality in the country should be forced to accept, as maximum milk standards, the standards suggested by the United States Public Health Service as minimum standards, and should be forced to accept the so-called "reciprocal inspection" system for accepting milk from other localities suggested by that Service. Appellees maintain that in the absence of Federal or State regulation and inspection each locality has a right to determine for itself, within reasonable limits, what standards, regulation and inspection it may impose and require for the protection of public health and to adopt measures to make the operation of its regulation and inspection more efficient and economical.

The question is not, as stated by the appellant (Brief, p. 47), whether the competitive system of the country is

to stand. The question is, instead, whether local regulation of milk supplies for the protection of public health is to stand. While appellant professes to be attacking the five-mile milk pasteurization limit contained in section 7.21 of the City of Madison general ordinances, it is, in actuality attacking the whole milk regulatory system of the country as it is now, and has always been, constituted.

Throughout its brief appellant has intermixed arguments dealing with the provisions of section 7.21 and section 7.11 of the Madison ordinances and arguments under the Fourteenth Amendment and the Interstate Commerce Clause of the United States Constitution. The State courts in this case properly recognized the two ordinance provisions were entirely separate matters. They upheld the validity of Section 7.21 and refused to pass upon the validity of section 7.11. We propose in this brief to consider separately the matters of validity of section 7.21 (the five-mile pasteurization limit) under the Fourteenth Amendment and under the Interstate Commerce Clause, and at the end of the brief to deal with section 7.11 of the Madison ordinances.

I.

The Five-Mile Pasteurization Limit in Section 7.21 of the Madison Ordinances Is Valid Under the Fourteenth Amendment to the Constitution of the United States.

The Milk regulation ordinances of the City of Madison (R. 237-273), require inspection by Madison Health Department personnel of all milk sold in the City and require the licensing and inspection by the Madison Health Department of all farms where that milk is produced and of

the plants where it is processed. The ordinances contain detailed regulations covering all phases of the production, processing and distribution of milk. The five-mile pasteurization limit contained in section 7.21, which was originally adopted in 1939, and which is the provision attacked by appellant, is a part of the over-all milk ordinances.

Appellant's attack on the five-mile pasteurization limit under the Fourteenth Amendment of the Constitution of the United States is based principally on the due-process provision thereof. On a due-process attack on a local health measure, the issue involved is whether the provision attacked is palpably unreasonable and arbitrary. The appellees contend this five-mile pasteurization limit is a reasonable health regulation and a legitimate exercise of the police power of the City of Madison.

The differences between the parties on this point may be easily summarized. The City of Madison maintains that it, or any other municipality, has the right in the absence of State law to the contrary: (a) to set its own health standards for milk to be sold in the City and for the production, processing and delivery thereof, so long as those standards are reasonable; (b) by its own personnel to inspect such milk at all stages of production, processing and delivery; (c) to license and inspect with its own personnel all farms where such milk is produced and all plants where it is processed and bottled, and (d) having these rights, the City of Madison may take steps which tend to assure that the processing plants and the farms which produce the milk are within a convenient and efficient inspection distance from the City, and the five-mile pasteurization limit involved in this action is designed to accomplish that purpose and hence is a reasonable health requirement.

The appellant's argument is (a) that any municipal standards for fluid milk, and for the production and pro-

cessing thereof, which are higher or more stringent than the minimum standards suggested by the United States Public Health Service in its suggested "Milk Ordinance and Code" (Public Health Bulletin No. 220), are *ipso facto* unreasonable; (b) that the City of Madison must accept milk from any milk-shed which has been rated 90% or more according to milk-shed rating procedures suggested by the United States Public Health Service; (c) that it is unreasonable for the City of Madison to require its own licensing and inspection of the farms and plants located on such a milk shed, and (d) that, consequently, the City of Madison may not take steps to make the licensing and inspection of the plants and farms which supply the City more efficient and convenient by requiring that milk sold in the City shall be pasteurized within five miles of the City.

Appellees contend that the reasonable exercise of its police power by a municipality for the protection of the health and welfare of its citizens has always been sanctioned under the Fourteenth Amendment and that the five-mile pasteurization limit contained in section 7.21 of the Madison ordinances is such a reasonable exercise of the City's police powers.

A — The City of Madison has the right to enact reasonable milk regulations for the protection of public health.

This Court has on many occasions recognized that when it comes to the protection of public health or the promotion of public welfare, state and local regulations which are reasonably designed to promote those public interests meet all requirements of the due-process clause of the Fourteenth Amendment to the Constitution. In *Lieberman*

vs. Van De Carr, 199 U. S. 552, 26 S. Ct. 144, a New York City milk dealer attacked provisions of the New York City Sanitary Code which required licensing of milk dealers on the grounds that it violated the various provisions of the Fourteenth Amendment and on the further ground that the City admitted that his milk "stood well"—i.e. that it was "wholesome." The Court recognized the necessity of milk regulation and the scope of local powers of regulation as follows, 199 U. S. 552 at 563:

> "We have, then, an ordinance which, as construed in the highest court of the State, authorizes the exercise of a legal discretion in the granting or withholding of permits to transact a business, which, unless controlled, may be highly dangerous to the health of the community, and no affirmative showing that the power has been exerted in so arbitrary and oppressive a manner as to deprive the appellant of his property or liberty without due process of law.
>
> "In such cases it is the settled doctrine of this court that no Federal right is invaded, and no authority exists for declaring a law unconstitutional, duly passed by the legislative authority and approved by the highest court of the State. Nor do we think there is force in the contention that the appellant has been denied the equal protection of the laws, because of the allegation that the milk business is the only business dealing in foods which is thus regulated by the sanitary code. All milk dealers within the city are equally affected by the regulations of the sanitary code."

In *Hauge vs. Chicago*, 299 U. S. 387, 57 S. Ct., 241, this Court sustained an ordinance of the City of Chicago which

required all merchandise sold in the city in load lots by weight to be weighed by a public weighmaster in the city even though that required the expense and burden of unloading and reloading each truck after arrival in the city and even though the load had been weighed upon state tested scales at the point of loading. The Court said, 299 U. S. 387 at 392:

> "That the coal delivered by appellant was weighed at the mine on tested scales (tested by State authorities) is stressed; but this is not really material. Chicago had no control there and such weighing afforded no adequate protection against fraud. The opportunities for manipulation therefore are obvious.
>
> "Invalidity of the ordinance cannot be established by suggesting some other less burdensome procedure, which possibly might accomplish the end in view—honest delivery weight. The City may act with proper legislative discretion. Here there is nothing to show action so arbitrary, unreasonable, or discriminatory as to require us to overthrow its deliberate effort to meet a plain evil."

In upholding the New York State Milk Control Law against a due-process attack this Court in *Nebbia vs. New York*, 291 U. S. 502 at 537 said:

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. * * * With

> the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. The course of decision in this court exhibits a firm adherence to these principles. Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

In connection with these cases, we call the Court's attention to the fact the trial court specifically found that the five-mile limitation "constitutes a reasonable and proper health regulation for the protection of the lives and health of the residents of the City of Madison." (R. 54) The Wisconsin Supreme Court affirmed this finding. (R. 295)

All courts which have given proper consideration to the special health problems involved in the sale of fluid milk have recognized that special precautions are necessary and that wide latitude of regulations is given localities. In *Lieberman vs. Van De Carr*, 199 U. S. 552, this Court recognized there was no denial of equal protection of the laws because the City of New York Sanitary Code made milk, along among foods, subject to special regulation and licensing. In *Koy vs. City of Chicago*, 263 Ill. 122, 104 N. E. 1104, a dealer attempted to avoid compliance with a detailed pasteurization ordinance of the City of Chicago on the ground his milk was "clean" and "pure." The Court's decision contains an excellent summary of the peculiarities of milk which demand special regulation. This summary has been widely quoted by the courts.

"There is no article of food in more general use than milk; none whose impurity or unwholesomeness may more quickly, more widely, and more seriously affect the health of those who use it. The regulation of its sale is an imperative duty which has been universally recognized. This regulation in minute detail is essential, and extends from the health and keeping of the cows which produce the milk, through all the processes of transportation, preservation, and delivery to the consumer. Not only may laws and ordinances require that milk offered for sale shall be pure, wholesome, and free from the bacilli of any disease, but they may and do, in order to produce this result, prescribe the manner in which such purity, wholesomeness, and freedom from disease shall be secured and made to appear. The cows may be required to be registered with a designated public authority; the dairies to be conducted and managed according to prescribed regulations, and together with the dairy utensils, subjected to inspection; the receptacles in which milk is contained to be of prescribed character and capacity; the labels to be placed according to fixed regulations, and to contain certain required information; the milk to be prepared in the manner, at the times, and by the means directed, and at all times to be subject to inspection. These may be drastic restrictions upon a private business; but experience and the increasing knowledge of the causes of disease and the agencies of its propagation have demonstrated the necessity of such restrictions to the preservation of the public health."

Koy vs. City of Chicago,
263 Ill. 122, 130, 104 N. E. 1104, 1107.

See also:

Pfeffer vs. Milwaukee,
171 Wis. 514, 517, 177 N. W. 850;
City of Milwaukee vs. Childs Co.,
195 Wis. 148, 217 N. W. 703.

Survey of all cases which have upheld stringent local milk regulatory provisions would be unproductive here. We believe a typical case, illustrative of the general court decisions throughout the country is *Dean Milk Co. vs. City of Chicago*, 385 Ill. 565, 53 N. E. (2d) 612, where the appellant in this case attacked a Chicago ordinance permitting delivery of milk only in glass bottles and prohibiting delivery in paper containers. The dealer claimed paper containers were widely accepted in other communities; and there was extensive testimony on the relative sanitary merits of paper and glass. In upholding the ordinance, the court recognized the right of local communities to set their own reasonable milk standards:

> "The maintenance of a pure and wholesome milk supply is one of the principal concerns of municipal government. The regulation of the sale and distribution of milk is vital to the preservation of public health. The City of Chicago had the power and authority to enact an ordinance regulating and prescribing the containers in which milk in quantities of less than one gallon should be delivered within the city. We express no opinion as to the health merits of the controversy as between the single service Pure-Pak (paper) containers and the standard (glass) milk bottles. The evidence shows some valid reasons which the city council might well consider in requiring the use of the standard milk bottle. It is at least debatable and in such a case the city council is entitled to use its own legislative dis-

cretion and the courts will not disturb its action. The council is the sole judge of the necessity and wisdom of the ordinance enacted, and we are concerned only with its reasonableness * * *"

Dean Milk Co. vs. City of Chicago,
385 Ill. 565, 579.

Independent Dairymen's Ass'n vs. City and County of Denver, 142 Fed. (2d) 940 (CCA, 10), upheld a Denver ordinance prohibiting sale of milk in gallon bottles. *Gilchrist Drug Co. vs. City of Birmingham*, 234 Ala. 204, 174 So. 609, sustained a municipal ordinance requiring a particular method of freezing ice cream, over the objection that plaintiff's method was just as sanitary. These examples of various milk regulatory ordinances are illustrative; a great variety of cases are set forth in the annotation in 155 *A. L. R.* 1383, at 1395 et seq. and prior annotations there mentioned.

State courts which have considered ordinances similar to that involved herein, where facts were similar to those involved herein, have upheld the ordinances. *Lang's Creamery, Inc. vs. City of Niagara Falls*, 224 App. Div. 483, 231 N. Y. S. 368 (affirmed on other grounds, 251 N. Y. 343), involved an ordinance that all milk sold as pasteurized within the City of Niagara Falls must be pasteurized within the city limits. The plaintiff's milk was pasteurized in Buffalo and generally met all state and local requirements except for place of pasteurization. The Court concluded that the ordinance was not discriminatory, unreasonable, or unconstitutional and that its enforcement did not unlawfully interfere with property rights, nor hinder lawful trade:

"Whatever may be said of other methods of insuring wholesomeness in milk, pasteurization in

these days concededly tends to render milk wholesome. If any person desires to sell pasteurized milk, as such, in the City of Niagara Falls, the city, in the interest of the health of its citizens and visitors, has a right to know that the pasturization comes up to all reasonable standards of perfection. It has a right to be assured that slovenliness, unsanitation, or unscientific workmanship do not result in unwholesomeness. If a milk vendor in the City of Niagara Falls may pasteurize 100 feet outside the city limits, he may do so in the City of Syracuse, or at any far distant point. As to milk pasteurized outside the city and shipped in for consumption, the authorities in Niagara Falls could not be assured of wholesomeness without thoroughly examining and testing the milk in every bottle or other vessel brought into the city. The only adequate way of insuring proper pasteurization outside the city would be by inspection under the control of these defendants, through scrutiny, not only of the character of the plant as to sanitation, etc., but of the work done up to and including inclosing in containers for shipment."

"The argument that the city might thus inspect pasteurizing plants and charge the expense to the milk dealers is hardly reasonable; for the record does not indicate that there is any way in which the city could require milk dealers to pay such expense. The ordinance is a general one, and must be considered in its general application. It applies to dealers whose pasteurization plants are located at long distances from the City of Niagara Falls, as well as to any who may operate near to the city line."

Lange's Creamery, Inc. vs. City of Niagara Falls, 244 App. Div. 483, 231 N. Y. S. 368, 372.

In *Witt vs. Klimm*, 97 Cal. App. 131, 274 P. 1039 (Dist. App. Ct., hearing denied Cal. Sup. Ct.), an ordinance of the City of San Francisco required pasteurized milk sold in the city to be pasteurized within the city and county of San Francisco. The California State "Pure Milk Law" established uniform regulation for production and sale of milk, with a provision for establishment and maintenance of milk inspection services by municipalities or groups of municipalities, under which the city and county of San Francisco had its own inspection services and the County of San Mateo, where plaintiff's milk was produced and pasteurized (two miles from limits of the city and county of San Francisco), had its own service. The milk and pasteurization processes complied with the state law and San Francisco ordinances; only the place of pasteurization barred the milk from San Francisco. The court upheld the ordinance as not unreasonable or discriminatory against outside dealers:

> "The provision of the ordinance requiring that the milk be pasteurized within the city and county of San Francisco is simply a new and additional and more stringent regulation than that contained in the state law on the same subject. These requirements of the ordinance are not in themselves unreasonable or discriminatory and do not conflict with the state law, therefore, both may stand."
>
> "If petitioners' contention be sound, and the health department of the city and county of San Francisco be required to go to Colma and there inspect petitioners' pasteurization plant, there would be nothing to prevent all outside dealers in milk from requiring the same thing, and the health department would be called upon to make inspections of pasteurization plants in many of the other coun-

ties of the state such as Almeda, Solano, Contra Costa and possibly others. It goes without saying that such a requirement of the health department would not only be unreasonable and exceedingly expensive, but it would seriously impair, if not wholly destroy, the efficiency of the entire inspection service."

Witt vs. Klimm,
97 Cal. App. 131, 135.

Thus, all courts recognize municipal powers to maintain detailed milk regulations even though they seriously affect private business. They further recognize that such regulations will not be annulled unless palpably in excess of legislative powers. In the two cases last cited, ordinances in all practical respects identical to that involved herein were upheld as reasonable and non-discriminatory.

B — The Madison five-mile pasteurization limit is a reasonable exercise of the City's police power for the protection of public health.

Appellant's whole argument attacking the Madison five-mile pasteurization limit contained in Section 7.21 of the Madison ordinances as unreasonable is a contention that the failure of a city to accept milk from another milkshed on the basis of the "reciprocal inspection" provision in section 11 of the so-called "Model Ordinance" suggested by the United States Public Health Service is palpably unreasonable and arbitrary. Appellant would deny to a city the right to set any milk standards higher than those in the "Model Ordinance" and would deny to a city the right of licensing and inspection of, indeed of any con-

trol over, milk originating on another milk-shed and the farms and plants which produce and process that milk. Appellant would have this court declare that the milk standards of the suggested "Model Ordinance" which the United States Public Health Service itself has suggested as only *minimum* standards (R. 146), are in fact the *maximum* standards to be permitted any municipality in the country; and that the suggested "reciprocal inspection" provisions of Section 11 of the "Model Ordinance" are in fact obligatory on every municipality.

It is submitted that these contentions of the appellant are demonstrably untenable. A brief consideration of the matter shows it is not unreasonable for a city to set its own reasonable standards and to require the inspection of its milk and the licensing and inspection of the sources thereof and of the plants which process the milk; and it is not unreasonable for Madison to increase the efficiency and reduce the cost of its licensing and inspection by its five-mile pasteurization limit, which requires pasteurization plants to be close at hand, which tends to utilize the more-than-adequate nearby sources of milk.

Before beginning consideration of these matters, however, it is necessary to correct appellant's constant inferences and direct assertions that the purposes of the contested ordinance are to impose "economic protection" (Brief, pagg 59), and to "prevent plaintiff from selling milk in Madison for the purpose of avoiding local competition" (Brief, page 68), and that the ordinance is a "trade barrier," etc. These assertions and epithets are completely and entirely negatived by the record in this case. Dr. Louis Fauerbach, Assistant Health Commissioner of Madison since 1923, testified the purpose of the enactment of the ordinance in 1930 was convenience and efficiency of inspection and controlling standards and

utilization of nearby sources of milk. (R. 129) That testimony is undisputed in the record; nor does the record disclose any intention whatever of the City to prevent competition or to protect anyone from competition. Nothing in the ordinance, or in any other Madison ordinance, precludes the appellant from establishing a pasteurization plant within five miles of the city and from selling milk from that plant in the city so long as appellant is willing to conform to Madison health standards and regulations. There is no prejudice on the part of the city against appellant or any attempt to limit competition. The ordinance under consideration was adopted as a bonafide health measure, and for no other purpose. The issue is solely whether it is so palpably unreasonable and arbitrary an exercise of the city's police power for the protection of public health as to exceed the city's constitutional powers.

It is not disputed that the ordinance provision "bears adversely" (See *H. P. Hood & Sons vs. DuMond*, 336 U. S. 525, 531), on the appellant as well as on all others who are required to comply with it. Of necessity, every health regulation bears adversely on the business of those who are subject to it. Madison's prohibition of the sale of raw, unpasteurized milk in the city (a most common municipal prohibition, of unquestioned legality), adversely affects the business interests of all those who might wish to sell raw milk and might wish to prove that their milk is produced under excellent conditions and is in fact pure and wholesome . That the ordinance provision involved in this case adversely affects appellant, because appellant is unwilling to comply with it, most assuredly does not make the regulation a "trade barrier" or indicate any of the improper intentions charged by appellant against the city.

1. *Appellant's contention would destroy various recognized rights of municipal control of milk.*

What are the rights of a city to regulate and control its milk supply? Unquestionably, to the extent such action is not prohibited by state constitution or legislation, a city may enact and maintain reasonable fluid milk regulations to preserve the public health, including the licensing and inspection of dairy plants and farms, at least on its own milk-shed. Appellant's contentions, however, would deny the City of Madison this power. Many farms within twenty-five miles of Madison, its normal milk-shed, deliver their milk to Chicago and are licensed and inspected by the Chicago Board of Health. (R. 119) If appellant's contentions were followed, since the entire Chicago milk shed in 1947 had a rate of 90% or more under the United States Public Health Service rating system, it would be unreasonable and improper for Madison to insist on licensing or inspecting any of these near-by farms from which a Madison distributor might wish to purchase milk. Madison would thus be forced to accept Chicago inspection even of milk produced in Madison's immediate environs, and this despite the fact that, as the Madison Chief Dairy Sanitarian testified, Madison's health department, because of past experiences, would not be satisfied with Chicago inspection. (R. 123)

Nor is a municipality denied the right to set milk production health standards which are more stringent than the minimum standards presently suggested by the United States Public Health Service, so long as they are reasonable. But to accept appellant's argument in this case would amount to a mandatory limitation of all localities in the country to the United States Public Health Service's present suggestions for minimum requirements. Even the United States Public Health Service itself does not object

to the use of higher requirements. (R. 147) The "Foreword" to "Public Health Bulletin, No. 220," which contains the suggested ordinance, points out that "upward modifications" in a local ordinance will not bar the locality from being included in the lists issued from time to time by the United States Public Health Service of communities which have adopted the suggested ordinance. (See United States Public Health Service "Public Health Bulletin No. 220," 1939 Ed., page VIII) The United States Public Health Service suggested ordinance, if adopted in full by a community, would permit the sale of raw, unpasteurized milk (R. 171); most assuredly that does not prevent a community from prohibiting the sale of unpasteurized milk, as does Madison. (R. 264)

Furthermore, the United States Public Health Service itself from time to time amends and strengthens its suggested minimum requirements. In an amendment in process of approval at the time of trial of this case (R. 158), the Public Health Service reduced the temperature to which raw milk produced for pasteurization must be cooled immediately after milking from 70 degrees F. (See Ex. 1, Item 23 r, R. 178) to 60 degrees F. (See Ex. 2, Item 23 r, R. 194) Was this "upward revision" of its own suggested ordinance by the United States Public Health Service unreasonable? Clearly not—and no more so is it unreasonable for Madison, among its various "upward revisions" from the suggested ordinance, to require cooling to 60 degrees F. (Ex. 45, R. 258) before that standard was adopted by the United States Public Health Service. Appellant's contention, that the enforcement by a community of any standards higher than those currently suggested by the United States Public Health Service is ipso facto unreasonable, obviously cannot be sustained.

Appellant's assertion that its milk is produced under ordinances which are "the equivalent of the Madison ordinance" (Brief page 40) is contrary to the record. It is conceded that appellant's milk is produced under the City of Chicago milk ordinances, and that so far as the record is concerned, the milk and the farms on which it is produced meet the requirements of the Chicago ordinance. The record also conclusively shows that in various respects, as testified to by Dr. Louis Fauerbach, Assistant Health Commissioner of Madison, the requirements of the Madison ordinance are higher than those of Chicago. (R. 130-134) Dr. Fauerbach also testified that in his opinion Madison's higher requirements conduce to a higher and cleaner quality of milk, and that milk which meets the Chicago ordinance does not meet the Madison ordinance. (R. 135) Appellant attempts to belittle these differences as "trifling" (Brief, page 66) and "unsubstantial" (Brief, p. 40). True it is that the trial court made no finding that the differences between the Madison and Chicago ordinances are substantial, because the relative merits of the two ordinances and the reasonableness of Madison's additional requirements were not before the court for determination. However, the trial court most assuredly did not refer to the differences "in disgust" (Appellant's brief, p. 66); it merely properly held that consideration of the differences was unnecessary to decision of the constitutional question of validity of the five mile pasteurization limit, which was the only question before the court. (R. 6) The fact that the differences exist was introduced to show, and it conclusively shows, that forcing Madison to accept milk produced under the Chicago ordinance, as appellant is attempting to do by its argument that any milk which is wholesome enough for Chicago must be held wholesome enough for Madison, will force Madison to abandon all of its ordinance requirements which are more

stringent than Chicago's, and which Madison has believed desirable for the protection of public health, and regardless of the reasonableness of those requirements.

The reasonableness of those more stringent Madison provisions has not been involved and has not been passed upon at any time in this action. Possibly appellant would concede, however, that at least one of Madison's more stringent requirements—that milk be cooled on the farm to 60 degrees F. (R. 258) while Chicago requires cooling only to 65 degrees F. (R. 134)—is reasonable, since the United States Public Health Service even at the time of trial of this action was adopting the 60 degrees F. standard. (R. 194, 158) It is not inconceivable that the United States Public Health Service may in the future adopt others of Madison's "upward revisions" for its suggested minimum requirements. Meanwhile must Madison, or any other community, be required to foreswear improvement and increased stringency in its milk ordinances on the ground that such improvements have not yet been adopted by the United States Public Health Service as recommended minimum requirements, and hence are deemed *ipso facto* to be unreasonable and arbitrary? That is necessarily the effect of appellant's argument. It is submitted that such a determination would clearly not be in the public interest in the protection of public health; it would inevitably freeze all fluid milk health regulations at the present level of the United States Public Health Service suggested *minimum* standards and would slow down the progress of development of more adequate milk standards which has been in process on the state and municipal levels for many years.

Furthermore, appellant's contention that "wholesome" milk must be accepted by a community (e. g. Brief p. 68), even though it has not been produced under reasonable standards and regulations of the community, strikes at the very validity of all detailed fluid milk production

regulations. Presumably, appellant considers milk to be "wholesome" if the bacteria and other tests of the milk on delivery to the consumer are within recognized limits, irrespective of the conditions under which the milk is produced. Certainly it is not impossible for a careful operator to produce milk which is "wholesome" on a farm and by methods which fail to meet many of the farm requirements of any of the ordinances in the record of this case. If such milk may be forced on Madison because it is "wholesome," even though it was not produced under conditions required by the Madison ordinances (assuming those requirements are reasonable, which is not at issue in this case), then, by the same token, that milk is entitled to be accepted by the City of Chicago despite the fact that the lesser Chicago ordinances have not been complied with. Any provisions of the Chicago, or of any other city's, ordinances could be by-passed and be made nugatory by any distributor demonstrating that his milk is "wholesome" without compliance with the ordinance provisions.

What is "wholesome" milk, who is to determine whether given milk is "wholesome" and what standards are to be used? We submit the only proper and feasible answers to these questions, which are raised by appellant's position in this case, are: "wholesome" milk, so far as any individual community is concerned, is only milk which meets all the standards and requirements imposed by the community on the milk itself and on all phases of production, processing and delivery thereof, provided that those requirements are reasonable. Whether milk is to be considered "wholesome" is to be determined by each community (state, or municipality thereof in the absence of state regulation) by the standards of its own regulatory statutes or ordinances; so long as they are reasonable. Any other answers would allow a wholly new and hitherto unknown test of the validity of milk health regulations; they

would eliminate the recognized test, "Is this regulation a reasonable exercise of the police power for protection of the public health?"—and substitute therefor the test—"Is it *possible* for a given distributor or given farm operator to produce wholesome milk without compliance with the particular ordinance?" Such would, it is submitted, lead to complete chaos and inevitably cause the breakdown of all milk regulatory standards. This court in *Lieberman vs. Van De Carr*, 199 U. S. 522, recognized in effect, that a claim of "wholesomeness" does not exempt a dealer from regulation.

It is further submitted that a community has the right of inspection of all farms and plants which produce and process the milk sold in the community as well as of the milk itself. This right the appellant would deny, claiming that it is unreasonable and arbitrary for a city to require inspection by its own personnel of farms and plants delivering on another milk-shed which has been rated 90% or more according to the rating procedures recommended by the United States Public Health Service. By its argument, appellant attempts to force the entire local milk regulatory system of the country into the mold of the so-called "reciprocal inspection" provision of Section 11 of the United States Public Health Service suggested ordinance as recently revised. (Ex. 2, R. 193-195)

Appellees maintain that it is within the right and power of local governmental units to determine whether to insist on their own licensing and inspection of farms and plants whose milk is sold within the limits of their police jurisdiction, or whether to be satisfied with milk from other milk-sheds on the basis of licensing and inspection by some other local government.

Normal regulatory ordinances, as typified in the record of this case by the United States Public Health Service's

suggested ordinance and the actual Chicago and Madison ordinances, contain minutely detailed requirements covering farm conditions under which milk is produced. No such ordinance is satisfied with inspection of raw milk as it is delivered to the pasteurization plants (R. 85), or of the pasteurized product. No claim is made by appellant that such minute regulation of farms and plants is not necessary for the protection of public health. Granting the necessity for such detailed regulations, it is not unreasonable for a city to insist on its own enforcement of such regulations by its own licensing and inspection.

As stated by Dr. Fauerbach, long time Assistant Health Commissioner of Madison, the matter of personality enters into milk and farm inspection. He would not trust any inspection outside of Madison's jurisdiction where the city would not have control and constant supervision of the inspection personnel: there is no substitute for regular inspection by the city's own personnel. (R. 135) Dr. Starr Nichols, Assistant Director of the Wisconsin State Laboratory of Hygiene and Professor of Sanitary Chemistry at the University of Wisconsin, emphasized the necessity of constant and close supervision over farms, that an ordinance must be enforced, and that is not unreasonable for Madison to require inspection of plants and farms. (R. 159) This reasoning is clearly behind the very common requirement in municipal ordinances of licensing and inspection of all farms delivering in the municipality.

To deny the right to impose and enforce such requirement affects not only Madison but many large population centers. The City of Chicago maintains its own inspectors for milk produced in the Madison milk-shed but going to Chicago. (R. 119) The United States Congress has recognized the right of localities to license and inspect all sources of production by requiring that all milk shipped into the District of Columbia for fluid milk sales shall be

from sources licensed and inspected by the health officer of the District. The Act of Congress approved February 27, 1925 (43 Statutes at Large, Chap. 358; District of Columbia Code, Title 33, Sections 33-301 to 33-322), provide the municipal health regulations for fluid milk sold in the District of Columbia. While it is unnecessary to quote them in detail, we call the court's attention to the following sections:

> "No person shall keep or maintain a dairy or dairy farm within the District of Columbia, or produce for sale any milk or cream therein, or bring or send into said District for sale, any milk, cream, or ice cream without a permit so to do from the health officer of said District, and then only in accordance with the terms of said permit. * * *
>
> (43 Stat. 1004, Ch. 358, Sec. 2; Title 33, District of Columbia Code, 1940 Edition, Sec. 33-302)

> "Failure or refusal on the part of any person holding a permit under authority of sections 33-301 to 33-319 to permit the health officer of the District of Columbia, or his duly appointed representative, to inspect the dairy, dairy farm, cattle and all appurtenances of such dairy, dairy farm, or other places where said milk, cream, or ice cream are produced, stored, manufactured, handled, offered for sale, or sold may be deemed sufficient to suspend or revoke such permit at the discretion of said health officer.
>
> (43 Stat. 1005, Ch. 358, Sec. 5; Title 33, District of Columbia Code, 1940 Edition, Sec. 33-305)

"No person in the District of Columbia licensed under Sections 33-301 to 33-319 shall receive any milk or cream from any source until he shall have first ascertained from the health department that the person from which such milk is obtained holds a license from the health officer of said District to send milk or cream into the District of Columbia."

(43 Stat. 1008, Ch. 358, par. 18; Title 33, District of Columbia Code, 1940 Edition, Sec. 33-318)

Thus, Chicago, the District of Columbia and Madison all require licensing and inspection by their own personnel of all farms, milk from which is sold within those areas. The record in this case does not show how many other communities in the country have similar requirements. Appellees maintain that denial of this right of inspection, which would inevitably follow from acceptance of appellant's argument, is wholly unjustified.

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2. *Section 11 of the United States Public Health Service suggested ordinance does not assure the receipt of milk of good quality.*

A brief examination of the so-called milk-shed grading system used under the auspices of the United States Public Health Service, which appellant claims must be relied on by a municipality if it would avoid the taint of unreasonableness in its milk regulation, demonstrates that the position taken by Madison and other cities is not unreasonable.

The grading or scoring system which is suggested by United States Public Health Service as the basis for acceptance of milk from another milk-shed does not in any way

involve continual inspection or a complete inspection of the milk-shed by U. S. P. H. personnel. The rating system was primarily set up to help evaluate the enforcement procedures of the local health department having authority over the particular milk-shed. (R. 144) As applied to the Chicago milk-shed and the Chicago Health Department, under whose supervision the appellant's milk is produced, the record shows that the rating is made by a "spot check" system which involves the inspection of only two hundred farms out of the total of more than ten thousand farms on the Chicago milk-shed and of the same proportion of pasteurization plants. (R. 145) The individual farm and plant inspections are scored and averaged out to result in a single rating for the farms and a rating for the pasteurization plants of the entire milk-shed. The inspection and rating work is done by State Board of Health personnel using procedures recommended by the United States Public Health Service. The final rating does not necessarily give an accurate indication of the quality of the actual milk produced on the majority of the farms on the milk-shed. (R. 145) The ratings are compliance ratings and not safety ratings and do not necessarily mean that all of the milk supplies on the milk-shed involved are safe, even if the rating is more than ninety per cent. (R. 147) Specifically applied to the Dean Milk Company, the rating of more than ninety per cent for the entire Chicago milk shed relied upon by appellant, which was made in 1947 (R. 198), may not have included inspection of any of the farms supplying the appellant's plants, or any of the appellant's plants themselves. (R. 157)

Exhibit 3 (R. 195), a letter to Dean Milk Company from the United States Public Health Service, relied upon by appellant to establish a rating of its own milk (R. 84), merely shows the rating of the entire Chicago milk-shed. (R. 157) In this connection, *City of Electra vs. Carnation*

Co., 207 S. W. (2d) 192 (Texas Civ. App.), is commended to the Court's attention. There an ordinance attempted to permit entry of milk which was rated 90% or better "on the basis of the Public Health Service Rating Method." Recognizing that the ordinance confused grading of milk with rating of milk-sheds and hence set no milk standards whatever, the court said, 207 S. W. (2d) 192, 194:

> "The (U.S.P.H.) suggested rating of a milk-shed is not designed or intended to determine the grade or quality of the milk of a given producer or processor in such area, but only to show the average conditions prevailing in the entire area * * * "

There is nothing in the so-called "Model Ordinance" which would require a city to rely on this "spot check" system. (R. 147) The last rating of the Chicago milk-shed was made about two years before the trial of this case. (R. 198) Yet the appellant claims it is unreasonable and arbitrary for the City of Madison, or for any other City to refuse to accept milk from any other milk-shed in the country wholly on the basis of inspection made by the health officer with supervision over that milk-shed plus a rating of ninety per cent of the entire milk shed. Clearly, the appellant's position is untenable.

It is submitted there is nothing on the record in this case which would justify the conclusion that the refusal by a municipality to rely on this so-called reciprocal inspection system and the insistence of that municipality on inspection by its own personnel is so unreasonable and arbitrary that this court should deny the right to all cities in the country of controlling their own inspection of their milk supplies.

Appellant's brief states that from fifteen hundred to two thousand localities in the country have adopted the suggested "Model Ordinance." Nothing in the record

shows how many of them have or have not adopted the reciprocal inspection feature found in section 11 thereof. That the City of Janesville, Wisconsin, has decided to accept milk from the Chicago milk-shed without its own licensing and inspection is immaterial to the issue of reasonableness of Madison's decision to require inspection by its own personnel. If the citizens of Janesville believe that Chicago inspection is sufficient—or if they should believe they are safe in drinking unpasteurized milk without any ordinance or inspection—that is their prerogative.

While appellant's brief (p. 45) claims agreement among various witnesses to the adequacy of section 11 of the suggested ordinance, examination of their testimony does not bear out that statement. Dr. Kincaid stated it is a matter of opinion (R. 66); Edward Friday, Senior Milk Sanitarian of Madison, pointed out there are degrees of safety, and that "in order to promote the greatest amount of public health in our milk supply, I believe that our department should make inspections of all farms and all plants." He also pointed out that if a city is unable to make inspections, it would have to resort to the rating procedure of the United States Public Health Service. (R. 127-128) Clarence Luchterhand, Milk Sanitarian for the Wisconsin State Board of Health, stated "it would be difficult to answer whether a health commissioner of a particular city could reasonably conclude that the spot check system advocated by the United States Public Health Service would not be as efficient as that made by some other method; that would be a prerogative of the local health officer." (R. 149) When asked specifically whether the Madison five mile pasteurization limitation is a necessary health measure, he stated he believed it is a prerogative of the local community. (R. 153)

Attention should also be called to testimony not pointed out by appellant. Dr. Starr Nichols, Professor of Sanitary Chemistry at the University of Wisconsin and Assistant Director of the Wisconsin State Laboratory of Hygiene, stated it is necessary to exercise constant and close supervision over cattle, farms and milk plants; that an ordinance is not sufficient since it must be enforced; and that it is not unreasonable for Madison to require inspection of plants and farms. (R. 159) He further stated he thought pasteurization plants should be within a reasonable distance of Madison, and that farms likewise should be within a reasonable distance, because you have better control over production. (R. 160). Dr. Louis Fauerbach, Assistant Health Commissioner of Madison stated he would not trust any inspection outside of Madison's jurisdiction beyond which the City could have control and constant supervision, and there is no substitute for regular inspection by the city's own personnel. He flatly stated he would not be willing to rely on inspectors of the Chicago Board of Health to inspect the source of supply of Madison's milk. (R. 135)

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3. Fluid milk regulation and inspection problems are not comparable to those of meats and vegetables.

Throughout its brief appellant has considered fluid milk in the same category as meats and vegetables as far as the necessity of local inspection and of local licensing is concerned. These arguments clearly disregard many vital differences between milk and meats and disregard the health problems involved.

Fluid milk production, processing and distribution is largely a local matter while meat is nation wide. As the record in this case shows, raw milk tends to flow from the

farm to nearby plants. (R. 122) The Madison distributors are all supplied by about five hundred farms, all located within twenty miles of the City. The appellant's large plants at Chemung and Huntley, Illinois, each supplied by more than one thousand farms, draw only from a radius of from twenty-five to thirty miles. We submit the Court can take judicial notice of the fact that most of the cities of the country have located in or near them the milk pasteurizing and bottling plants which serve the consumers in their immediate areas. However, with respect to meats it is common knowledge that the meat industry of the country is largely served by the processing plants in the great packing centers such as Chicago and Kansas City. Unlike the normal milk bottling plant, these meat packing centers draw their raw materials from great distances and distribute their finished products throughout the nation. The entire economic organization of the fluid milk pasteurizing and distributing business is essentially local, while that of meat processing and distribution is essentially nation wide in scope.

Furthermore, the health regulations which have of necessity been developed for fluid milk are entirely different in character from those for meats and they require local supervision to an extent unknown in meats. Milk regulations, as typified by the Madison milk ordinances and the milk ordinance recommended by the United States Public Health Service, not only require inspection of the raw material as it is delivered to the processing plant and of the finished product as it goes through and leaves the plant; they contain minute requirements regulating conditions on the farms on which the milk is produced. The milk ordinance recommended by the United States Public Health Service contains thirty-five paragraphs of detailed farm regulations alone, covering construction of farm buildings, sanitation, and the entire field of keeping and care of dairy cows

and drawing and handling of milk and all phases of farm activity which can possibly affect the quality of milk produced (R. 168-180); the "Milk Code" to be used as legal interpretation of those farm provisions contains some forty-four pages of fine print (see Public Health Bulletin, No. 220, 1939 Ed., pages 37-81). The Madison milk ordinance contains some thirty-four paragraphs of such detailed farm regulations. No doubt any such farm regulations dealing with the production of meat animals would be unreasonable. However, in the case of fluid milk they are recognized as reasonable and necessary for the protection of the public health.

Furthermore, while each meat carcass can be inspected in the packing plant so that in effect all meat shipped from a plant is inspected in the plant, the inspection of each quart of milk is not possible. Testing and inspection of milk is done by a process of periodic sampling. The maintenance of uniformly good farm conditions is relied upon for the maintenance of good milk delivered from a farm between samplings. Also many of the farm standards set by the ordinances require considerable discretion and judgment on the part of inspectors. Thus, certain of the ordinance requirements are that barns, milk houses, etc., shall be "kept clean." As was testified by Dr. Fauerbach, Assistant Health Commissioner of Madison, he would not trust any inspection outside of the City's jurisdiction beyond which it could have control and constant supervision, because personality enters into inspection work and there is no substitute for regular inspection of farms by the City's own personnel. (R. page 135)

Thus, inspection of fluid milk and of the farms which produce it is necessarily a local matter and it is submitted that it is not unreasonable for a community to insist on inspection by its own personnel rather than to rely on the personnel of other municipalities.

4. *General Order 125 of the Wisconsin Department of Agriculture does not affect this case.*

Several arguments and statements of appellant scattered throughout its brief require brief mention and correction.

At various points in its brief, appellant has referred to General Order 125 issued by the Wisconsin Department of Agriculture. This order is not in the record of this case, but since appellant has referred to it, we have set out the pertinent portions, omitting the technical specifications, in an appendix to this brief. First, be it noted, appellant concedes the Wisconsin Department of Agriculture has no authority to prescribe standards for Wisconsin cities (Brief, p. 57); consequently appellant agrees this is in no sense State law or regulation limiting Madison to the standards of the order. This is a voluntary program, open only to persons who voluntarily subscribe to and participate in the program (Sections 3.01 and 3.02) in an effort to make Wisconsin milk more acceptable to fluid milk users elsewhere in the nation who are willing to rely on United State Public Health standards and methods. It recognizes the right of foreign markets to set higher standards. (Section 11.01) In no way does it attempt to deny the right of foreign markets to send their inspectors into Wisconsin to inspect milk and farms here, a procedure Chicago uses. The regulation has no bearing on the issues in this case. Appellant's statement that this regulation some way permits Wisconsin milk to "flow freely in interstate commerce" (Brief, p. 43) is, of course, meaningless; milk licensed under this program flows no more freely in interstate commerce than did milk before the regulation or milk not under the program.

Appellant's claim at page 44 of its brief, that Madison is, in fact, delegating to others than its own inspection

force, the inspection of certified milk and that Madison has exempted certified milk from the five mile pasteurization limit is completely unsupported by the record. Section 7.15 of the Madison ordinances, cited by appellant, on its face has no such connotation; it requires supervision by the State Board of Health or by the city. The record does not even disclose that the State Board of Health has any such service available. Further, all milk, including certified milk, must be pasteurized (Section 7.17, R. 264), and hence is subject to the five mile pasteurization limit.

No more meritorious is appellant's argument that Madison "has for years, and still is, forced to drink ungraded milk" (Brief, p. 46), which is merely an attempt to infer that Madison's milk has been poor. The record contains no comparison of the quality of appellant's milk and of that sold in Madison. Until amendment of Madison's ordinances on August 27, 1949—about six weeks before trial of this case—the Madison ordinances had neither required nor permitted a "Grade A" label on pasteurized milk. (R. 208-236) As of the date of trial no distributor of milk in Madison was using a "Grade A" label, because there had not been time since the new ordinance for plants to qualify for use of Madison "Grade A" label, which required them to meet standards higher than those of the United States Public Health minimum suggestions. If a frank departure from the record will be forgiven, we can advise appellant that within a very short time after the trial, all milk sold in Madison was "Grade A" by Madison's higher standards, and was so labelled. However, a "Grade A" label is obviously meaningless unless one knows the ordinances and the inspection under which it is permitted. In the absence of State law or municipal ordinance to the contrary, "Grade A" signifies nothing. At page 57 of its brief, appellant refers to stamping of milk produced under the United

States Public Health minimum suggested standards as "*U. S.* Grade A." There is no such label provided for in the United States Public Health suggested ordinance or elsewhere.

Appellant's argument (Brief, p. 72), that Section 7.25 of the present Madison ordinances, which refers over to the United States Public Health Service Milk Code, in any way affects this case is equally spurious. That section obviously can refer only to those sections of the code which deal with provisions of the Madison ordinance modeled after the United States Public Health Service suggested ordinance; on its very face Section 7.25 states the Code shall not apply to upward revisions.

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5. *The State Court cases cited by appellant are not relevan to the Madison ordinance.*

Analysis of the State Court cases relied on by appellant shows that in all those cases there were present elements not present in this case, which led to the decisions cited. *Higgins vs. City of Galesburg*, 401 Ill. 87, 81 N. E. (2d) 520, expressly refrained from passing on any constitutional questions. The entire basis of the decision was that under the Illinois Cities and Villages Act, which grants such powers as Illinois municipalities have, a municipality is forbidden police jurisdiction beyond one-half mile from its corporate limits; hence it has no authority under state law to require licensing of either producers or processors located farther away or to require that milk be pasteurized within ten miles of the city. *Dean Milk Company vs. City of Waukegan*, 403 Ill. 597, 87 N. E. (2d) 751, was decided on the same ground, with the court further pointing out that the Waukegan ordinance completely prohibited the

sale of milk from beyond the county in which Waukegan is situated and that the city was in fact accepting outside milk upon the inspection made by another municipality. None of these elements is present in the case at bar.

La Franchi vs. City of Santa Rosa, 8 Cal. (2d) 331, 65 P. (2d) 1301, was decided under California state law which fixed fluid milk standards and allowed municipalities individually and in groups to establish inspection services and which provided milk graded and inspected by one district shall be accepted throughout the district. The milk inspector from Santa Rosa actually inspected the plaintiff's raw milk; and the same man, in his capacity of milk inspector for an adjoining city, actually inspected the nearby pasteurization plant from which plaintiff wished to sell milk in Santa Rosa. The milk was conceded to meet all standards of state law and of the Santa Rosa ordinances, except it was pasteurized five miles outside the city. Plaintiff's plant was located within the Santa Rosa inspection district approved by state authorities. Under these circumstances, none of which is present here, the court held Santa Rosa's ordinance requiring pasteurization within the city limits to be invalid, and that its purpose was to erect a tariff barrier. The court distinguished *Witt vs. Klimm*, 97 Cal. App. 131, 274 P. 1039, by pointing out that there the milk was not from the same inspection district and hence the state law did not require its acceptance by San Francisco.

Another feature of the California state law was the basis for decision of *Meridian Ltd. vs. Sippy*, 54 Col. App. (2d) 214, 128 P. (2d) 884, which condemned an ordinance of the City of Stockton requiring licensing of all producers and distributors of milk and forbidding licensing of such persons located beyond the limits of jurisdiction of its health officer (San Joachim County). The court based

its decision on the California Agricultural Code which provided that the State Department of Agriculture could name the health officer of one community to license and inspect for all communities in which the milk was to be sold and to enforce all milk ordinances of all such communities. The State Department had named the Oakland health officer to inspect and license the milk involved here; hence the court held the admittedly higher standards of Stockton would be protected under the state system. The court did recognize that, lacking such system, a city might be justified in establishing its own inspection area:

> "If there were no general law on the subject giving to the people of the City of Stockton the protection of its high standards required by its ordinance, it might be reasonable to hold that Stockton or any other municipality, for the protection of the health of its inhabitants, could establish a reasonable inspection area; but the general law gives the state no right to issue a permit to sell or distribute milk in the City of Stockton, unless the permittee meets the standards of its ordinance. Therefore, it is unreasonable to require double inspection of the distributors, one by the city and another by the state, and also to require that the milk so distributed be produced in San Joachim County."
>
> *Meridian, Ltd. vs. Sippy,*
> 128 P. (2d) 884, 888.

Prescott vs. City of Borger, 158 S. W. (2d) 578 (Court of Civil Appeals, Texas), decided no question of constitutionality under the United States Constitution. It was decided wholly under Texas law—that since the State Legislature had entered the field of fluid milk regulation by statewide statutory regulation, a Texas municipality did not

have power to require that its milk be produced in a given county. *City of Abilene vs. Tennessee Dairies*, 225 S. W. (2d) 429 (Court of Civil Appeals, Texas), merely held that in view of the fact that plaintiff's milk was inspected by State inspectors, it was unreasonable of the City of Abilene to require its own inspection and to charge some distributors a heavy inspection fee amounting to about four times the fee charged local distributors.

In *Grant vs. Leavell*, 259 Ky. 267, 82 S. W. (2d) 283, the City of Louisville tried to regulate the sale of raw unpasteurized milk by an ordinance providing that no raw milk plants constructed beyond the corporate limits of the city after the enactment of the ordinance, should be permitted to sell milk in the city except as permitted by the health officer. The health officer then took the position that dealers already operating were furnishing enough milk to supply the city's demands for raw milk and refused to license the plant of plaintiff which was built after the ordinance was enacted and outside the city. The court pointed out the discrimination in allowing those already in the business to continue while denying the right of new companies to enter the business and struck out of the ordinance the provision denying the right to do business to plants built after the ordinance and outside the city.

In *Urban vs. Taylor*, 117 N. J. M. 887, 188 Atl. 232, again there was inspection by state inspectors under state law, and the town merely took the position it had enough milk dealers. The court specifically said "Mere lack of funds to investigate a source of supply is not sufficient reason to justify the refusal of a permit, in view of *the circumstances that there seems to have been adequate inspection by state inspectors.*" (emphasis added)

City of Greenville vs. Cabell's, Inc., 207 S. W. (2d) 898 (Court of Civil Appeals, Texas), has no bearing on this

case. There was no pasteurization limit involved; under the city's ordinances all milk was admissible if it met the city's standards, and the court found Cabell's milk met those standards and also met state standards and was state inspected. Properly, in this situation, the court held refusal of the city health officer to admit Cabell's milk was arbitrary.

In *City of Wewoka vs. Rose Lawn Dairy*, 212 P. (2d) 1056 (Sup. Ct., Okla.), there were two important elements not present in the case at bar. Oklahoma had complete milk regulatory statutes with state inspection and the court found the Dairy's milk met state standards and was state inspected. The city ordinance, furthermore, contained the "reciprocal inspection" provisions of section 11 of the United States Public Health suggested ordinance. The court held, under that ordinance provision, lack of funds to inspect distant milk plants and their supplying farms located on a milk shed with a grade of 90% or more is no basis for refusing milk from that plant; in effect the court held if the section 11 "reciprocal inspection" provision is adopted a city has given up its right to license and inspect distant plants and farms. This decision strikingly illustrates the reason why Madison refused to adopt section 11; adoption would require Madison either to forego inspection of distant plants and farms and rely on foreign inspection over which it has no control, or to suffer unbearable inspection costs to accommodate any distant dairy company that might wish to attempt selling milk in Madison.

Again, in *Moultrie Milk Shed vs. City of Cairo*, 206 Ga. 348, 57 S. E. (2d) 199, the decision shows there was complete state regulation and inspection of all milk including the milk of the dairy involved. Further it is clear from the decision that the complaining dairy's milk had been accepted in the City of Cairo until passage of the ordinance

requiring pasteurization in the county in which Cairo is located. Under these circumstances, which are quite different from those in Madison, the Court held the ordinance was, in purpose, a trade barrier. The court, it may be noted, specifically differentiated and cast no doubt upon an earlier decision. *Wright vs. Richmond County Dept. of Health*, 182 Ga. 651, 186 S. E. 815, which upheld a local ordinance prohibiting the sale of ice cream manufactured beyond a radius of sixty miles.

In *State ex rel Larson vs. City of Minneapolis*, 190 Minn. 138, 251 N. W. 121, the Minneapolis milk ordinances did not contain detailed farm regulations or provide for farm licensing and inspection as is provided in the Madison and all other modern milk ordinances.

Therefore, it is submitted that appellant's statement (Brief, p. 75), that no state court decisions have held ordinances similar to Madison's to be valid, is, indeed, incorrect. None of the cases discussed by appellant contained situations of fact and of state law similar to those in Madison's case. Madison's case, it is submitted, is that involved in *Lang's Creamery, Inc. vs. City of Niagara Falls*, 224 App. Div. 483, 231 N. Y. S. 368, and *Witt vs. Klimm*, 97 Cal. App. 131, 274 P. 1039, cases apparently overlooked by appellant, in both of which cases ordinances similar to Madison's were upheld on attacks based on the Fourteenth Amendment. Also in *McKenna vs. City of Galveston*, 113 S. W. (2d) 606 (Ct. of Civ. App., Texas), a local ordinance prohibiting sale in the city of ice cream not pasteurized and frozen on the same premises in the city was held a reasonable exercise of the city's police power.

The Wisconsin Supreme Court has on two occasions affirmed the validity of pasteurization limits for individual Wisconsin cities. *Dyer vs. City of Beloit*, 250 Wis. 61, 27 N. W. (2d) 733. *Dean Milk Company vs. City of Madi-*

son, 257 Wis. 308, 43 N. W. (2d) 480. The court has specifically found the ordinances reasonable in the light of the local conditions involved, upon application of the test of validity expressed in the *Dyer* case and reaffirmed in *Dean Milk Company vs. City of Madison*, 257 Wis. 308 at 313, which test we submit is proper and was properly applied in this case:

> "That cities have a right to pass a milk ordinance for the welfare and health of their citizens is not disputed, and milk ordinances are general in the state of Wisconsin and elsewhere in the nation. Such an ordinance must be reasonable and not arbitrary, must not go beyond the reasonable demands of the occasion, and must tend to accomplish the purpose of its adoption. Courts will not interfere with the exercise of police power by a municipal corporation in the absence of a clear abuse of discretion and unless it is manifestly unreasonable and oppressive, for it is not within the province of the courts, except in clear cases, to interfere with the exercise of this power reposed by law in municipal corporations * * *"

It is submitted that the ordinance involved is reasonable and non-discriminatory, as was specifically found by both the trial court and the Wisconsin Supreme Court in this case; and that as stated by the trial court: "The City of Madison—in the public concern over health—has an autonomy, a measure of local self government, which, if exercised reasonably, need give way only to a constitutional enactment by the legislature of Wisconsin or the Congress of the United States, if such exists. None such does exist as yet." Therefore, it is submitted that Madison's five-mile pasteurization ordinance is valid under the Fourteenth Amendment to the United States Constitution.

II.

The Five-Mile Pasteurization Limit Contained in Section 7.21 of the Madison Ordinances Is Not Invalid Under the Interstate Commerce Clause of the Constitution of the United States.

It is submitted that by all criteria of the validity of local health regulations which have been enunciated by this Court in dealing with commerce-clause attacks, the Madison five-mile pasteurization limit is a valid exercise of local police power for the protection of public health.

In dealing with the commerce-clause attack on the Madison ordinance, as was necessary on the due-process attack, analysis of appellant's contentions is necessary. Consideration of the consequences of such contentions if adopted will, it is submitted, demonstrate that appellant's contentions are wholly untenable.

Appellant's commerce-clause attacks on the ordinance all fall under the following arguments: (a) That the Madison five-mile pasteurization limit was adopted as an economic barrier and not as a measure for protection of public health; (b) That the ordinance discriminates against milk from outside the state; (c) That neither a state nor a municipality thereof can, under the commerce-clause, fix or maintain any milk standards for milk to be sold therein which are higher or more rigid than the minimum standards suggested by the United State Public Health Service or insist on its own inspection of milk from an out-of-state milk-shed which has been rated 90% or more under the suggested United States Public Health system; hence, that a state or locality thereof must accept milk from such an out-of-state milk-shed regardless of the receiving locality's higher standards and without inspection of the plants and

farms by its own personnel. We shall treat each of these attacks separately.

A — *The five-mile pasteurization limit is a reasonable exercise of the police power for the protection of the public health. It is not a barrier imposed for protection of local economic interests.*

To support its contention that the Madison five-mile pasteurization limit, as an alleged trade barrier, violates the commerce clause, appellant has relied upon *Baldwin vs. G. A. F. Seelig, Inc.*, 294 U. S. 511, 55 S. Ct. 497, and *H. P. Hood and Sons, Inc., vs. DuMond*, 336 U. S. 525, 69 S. Ct. 657. There, however, the Court was dealing with measures which were concededly designed for the protection of New York's residents from the *economic competition* of residents of other states. Referring to the measures involved in both cases, the court pointed out, in *H. P. Hood and Sons, Inc., vs. DuMond*, 336 U. S. 525 at 531:

> "In neither case is the measure supported by health or safety considerations but *solely* by protection of local economic interests, such as supply for local consumption and limitation of competition." (emphasis supplied)

In *Baldwin vs. G. A. F. Seelig, Inc.*, 294 U. S. 511, this Court condemned a New York statute which was attempting to protect New York milk producers from the competition of Vermont producers who were willing to sell their milk for less money. In *H. P. Hood & Sons, Inc., vs. DuMond*, 336 U. S. 525, the Court condemned New York's attempt to protect its milk consumers from the competition of Boston consumers. The Court recognized that neither

decision in any way denied to a state power to protect the health of its citizens: in *H. P. Hood & Sons, Inc., vs. Du-Mond*, 336 U. S. 525, at 531, the Court stated:

> "It (Mr. Justice Cardozo's opinion in Baldwin vs. G. A. F. Seelig, Inc.), recognized, as do we, broad power in the state to protect its inhabitants against perils to health or safety, fraudulent traders and highway hazards even by use of measures which bear adversely upon interstate commerce."

The Madison five mile pasteurization was not designed as a trade barrier or to suppress the competition of any person located within or without the state. It is a part of the City's detailed milk regulations which set standards for, and control over, the entire matter of production, processing and distribution of milk. It was enacted as part of that complete system of regulation to promote the convenience and efficiency of inspection and of controlling standards. (R. 129) Nothing in the ordinance or in any other Madison ordinance would prevent the appellant or any other distributor from engaging in pasteurization within the permitted distance and from competing with the present distributors—the record is entirely barren of any intent or desire on the part of the city to protect the present Madison distributors from competition. Nor does the record show any intent or desire to protect near-by producers in any way; how this ordinance could protect from competition the near-by producers, who have a variety of possible outlets for their milk, including shipment to the Chicago fluid milk market, is not explained by appellant.

The trial court specifically found: "Madison's five mile pasteurization ordinance is a valid regulation under the 'police power' to protect the public health and welfare.

It simplifies inspection of plants by requiring them to be near at hand, thus permitting more intense and constant inspecting than if such establishments were located anywhere in the United States" (R. 6, 53), and "That Section 7.21 of the general ordinances of the City of Madison constitutes a reasonable and proper health regulation for the protection of the lives and health of the residents of the City of Madison." (R. 54) The Supreme Court of Wisconsin concurred therein (R. 295):

> "We agree with the trial court. The five mile limitation as to pasteurization plants is reasonable as applied to this plaintiff. It has no pasteurization plant within any reasonable distance of Madison. This provision of this ordinance was not adopted to exclude plaintiff, nor does it discriminate against it."

Nothing in the record bears out appellant's claim that this ordinance is an economic barrier to prevent the competition in Madison of appellant or of any other distributor.

As pointed out by the trial court (R. 16), the five mile limit contains no limit on production of milk. If appellant were willing to comply with the city's pasteurization requirement, and if the milk of its Illinois producers and the conditions under which it was produced met Madison's standards and were licensed and inspected by Madison, nothing in the pasteurization limit of Section 7.21 of the Madison ordinances would prevent appellant from selling Illinois produced milk in Madison. True it is, the location of pasteurization plants within five miles of the city not only increases efficiency of inspection and supervision of those plants; also because milk tends to flow from the farm to nearby processing plants where the nearby supply is adequate (R. 122), the ordinance tends to a utilization of

the tremendous volume of milk produced on farms located within a reasonable inspection and supervision distance of Madison. (cf. *H. P. Hood & Sons, Inc., vs. DuMond*, 336 U. S. 525, 540)

With more than ten times Madison's total milk requirements being produced within 25 miles of the city, within an efficient and convenient inspection distance, it is entirely reasonable, it is submitted, for the city to adopt a measure which tends to utilize that supply which is located near enough for convenient and efficient inspection. Despite the fact the pasteurization limit does not prohibit the use of milk from beyond that distance, the record shows that all milk sold in the city since at least 1926 has been produced on farms within twenty miles of the city. (R. 118) The efficiency and economy of inspection and supervision of farms where the milk is produced, is therefore promoted.

In various fundamental respects the Madison situation differs from that presented to District Court in *Miller vs. Williams*, 12 F. Supp. 236 (D. C., Md.). There, the Health Commissioner of the City of Baltimore took it upon himself, without benefit of policy directed by the city government by ordinance, to prohibit absolutely the continued sale of cream which prior to that time had been admitted to the city, and which was produced more than fifty miles from the city. There was an absolute prohibition, which is lacking in this case; the cream involved had previously been admitted to the city, which is not the case here; there was no policy expressed by the city council as there is in this case. Furthermore, Judge Chestnut's attention apparently was not directed to the basic difference between fluid milk on the one hand and meats, vegetables and fruits on the other — he was worried that regulations approved for fluid milk might be held valid for these other foods, none of which require the detailed regulation and inspection of

the premises where produced, as fluid milk admittedly requires

Similarly, the factors present in *Sheffield Farms Co., Inc. vs. Seaman*, 114 N. J. Law 455, 177 Atl. 372, and *Urban vs. Taylor*, 117 N. J. M. 887, 188 Atl. 232, which determined those cases are not present here. There, there was a system of state inspection of milk and the court held, in effect, the city was bound as a matter of state law to accept the state inspection. There is no state inspection, nor are there state standards for municipalities in Wisconsin. Furthermore, here the local health department merely took the position there were already enough milk dealers in the city; none of Madison's ordinances in any way attempts to limit the number of dealers or to foreclose new dealers from entering business in Madison. In the cited cases, the Court's decisions were based on those factors which are not present here.

Unless the rights of a locality to set its own reasonable milk standards and to inspect all of its milk supplies and the farms where that milk is produced are to be denied, if they in any way affect interstate commerce, it submitted that a city situated as Madison is, in the heart of a nearby more than adequate milk supply, is not required to accept pasteurized milk from dealers in any part of the country merely because that milk is produced and processed on milk sheds which have been rated 90% or more. That is the tenor of appellant's contention. To accept the appellant's contention would deny the locality's right to set its own reasonable standards and to make its own inspections. To hold that a city situated as is Madison with respect to its milk supply may set its own standards and make its own inspections but that it may not take steps which tend to utilize its local supply would, as a practical matter, require abdication by the city of those rights. It would take at least three additional inspectors to inspect

the one plant and its supplying farms from which appellant proposes to deliver milk to Madison (R. 122), no matter how little milk appellant sold in Madison. For each other plant of appellant, or for each other dealer from Chicago or elsewhere in the country, that burden of inspection would be correspondingly increased. The burden of inspection of the 950 or more farms supplying appellant's Chemung plant is not the measure of the city's burden. If milk pasteurized in appellant's Chemung plant must be accepted by Madison, then so must milk pasteurized in any plant located any place in the country. Such burden would obviously be intolerable for a small city of Madison's size and the city would, of practical necessity, be forced to abandon its own standards and inspection.

B — *The Madison five-mile pasteurization limit does not discriminate against interstate commerce.*

Appellees herein recognize that local measures which discriminate against foreign business in favor of local business exceed local authority under the commerce-clause.

Baldwin vs. G. A. F. Seelig, Inc.,
294 U. S. 511, 55 S. Ct. 497.

However, in this case, despite appellant's protestations that it is being persecuted, no discrimination against it, or against any interstate commerce, has been, or can be shown. All of Madison's milk regulation ordinances, including the pasteurization requirement under attack, apply equally to milk produced any place—whether within or without the state, in the immediate vicinity of the city or at a great distance from it. All the regulatory ordinances apply equally to milk produced on the Madison, Milwaukee,

Green Bay or any other Wisconsin milk-shed as well as to that produced on the Chicago or any other foreign milk-shed.

The absence of discrimination against interstate commerce in favor of local commerce (as well as the difference between meats and fluid milk as to character of inspection required) distinguishes the Madison situation from the situations in *State of Minnesota vs. Barber*, 136 U. S. 313, 10 S. Ct. 862, and *Brimmer vs. Rebman*, 138 U. S. 78, 11 S. Ct. 213, which are relied upon by appellant. (Brief, pp. 50, 51) In each of those cases the Court found there was a discrimination directed against interstate commerce, which is not present here. In *State of Minnesota vs. Barber*, 136 U. S. 313, at 323, the court pointed out:

> "If this legislation does not make such discrimination against the products and business of other states in favor of the products and business of Minnesota, as interferes and burdens commerce among the several states, it would be difficult to enact legislation that would have that result."

In *Brimmer vs. Rebman*, 138 U. S. 78, 11 S. Ct. 213, the Court's decision was grounded on the fact that the state statute imposed no inspection or fee upon meats slaughtered within 100 miles of the place of sale but imposed inspection and a prohibitive fee on more distant meats. The presence of discrimination in those cases and the complete absence of it in this case, as well as the fundamentally different problems of meat and milk regulation discussed elsewhere in this brief, wholly set those cases apart from this. Under the Madison ordinance there is no discrimination of any kind; the ordinance under attack requires all milk, no matter where produced, to be pasteurized in plants licensed

by Madison and situated within five miles of the city's center.

C — *The Madison pasteurization limit does not contravene the Interstate Commerce Clause, because it lies within a field wherein Congress has not acted to establish regulations and which has been recognized as a proper field for local regulation.*

Appellant's basic contention, that a state or locality thereof cannot in any way interfere with or burden the interstate shipment of "wholesome" milk is, it is submitted, clearly based on a misconception of the place of the Interstate Commerce Clause in our constitutional system. Appellant's statement, "The Commerce Clause, *per se*, prohibits Madison from interfering with interstate commerce" (Brief. p. 48), is the basis of its whole argument and is patently not in accordance with long-standing doctrines established by this Court.

True it is that the Commerce Clause is a "grant of power to Congress to control commerce," *Carter vs. Commonwealth of Virginia*, 321 U. S. 131, 64 S. Ct. 464; and that it is a "limitation upon the power of the States," *Freeman vs. Hewitt*, 329 U. S. 249, 67 S. Ct. 274. But appellant fails to appreciate that this Court has always recognized certain areas in which the states and localities thereof have power of regulation even if that local regulation burdens or limits interstate commerce.

Freeman vs. Hewitt,
329 U. S. 249, 253;
H. P. Hood & Sons, Inc., vs. DuMond,
336 U. S. 525, 530.

In many cases this Court has allowed local regulations which "bear adversely upon interstate commerce" (*H. P. Hood & Sons, Inc., vs. DuMond*, 336 U. S. 525, 530), where either: (a) national uniformity of regulation is not essential and Congress has not acted on the subject, or (b) there is "only a partial exercise of that power of regulation by the federal government," or local regulation is allowed by Congress, *Cloverleaf Butter Co. vs. Patterson*, 315 U. S. 148, 155, 62 S. Ct. 491, 495, and cases therein cited. It is submitted that the field of local fluid milk standards and regulations is one wherein Congress has not acted, except to recognize and permit local standards and regulations; and that the field is, furthermore, one wherein national uniformity of regulation is neither essential nor practicable. Hence, it is submitted that appellant's contention that local standards for and regulation of fluid milk are not permitted under the Commerce Clause, even though they be reasonable and not discriminatory, cannot be sustained.

Citation of only a few cases decided by this Court demonstrates the recognition of the validity of local regulation in the fields above mentioned and the general principles enunciated by the Court. The areas within which local regulation are permitted have been discussed in *Parker vs. Brown*, 317 U. S. 341, 63 S. Ct. 307, wherein state regulation of the California raisin industry, which curtailed interstate shipment of raisins, was upheld by unanimous decision of the Court:

> "This Court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken." (citing cases)
>
> 317 U. S. 341, 360.

"When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. (citing cases)

"Such regulations by the court are to be sustained, not because they are 'indirect' rather than 'direct,' see Di Santo vs. Pennsylvania, supra; cf. Wickard vs. Filburn, supra, not because they control interstate activities, in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress. Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause." (citing cases)

317 U. S. 341 at 362, 363

"In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their

authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."

317 U. S. 341, 351.

In *Duckworth vs State of Arkansas*, 314 U. S. 390, 394, 62 S. Ct., 311, the Court stated:

"While the commerce clause has been interpreted as reserving to Congress the power to regulate interstate commerce in matters of national importance, that has never been deemed to exclude the states from regulating matters primarily of local concern with respect to which Congress has not exercised its power, even thought the regulation has some effect on interstate commerce."

314 U. S. 390, 394.

"Where the power to regulate commerce for local protection exists, the states may adopt effective measures to accomplish the permitted end."

314 U. S. 390, 396.

These cases set out the recognized doctrines of the power of local governments to regulate commerce in the absence of any Congressional action. There is no doubt that the power of Congress to regulate commerce is plenary, but in the absence of Congressional regulation, the localities are not devoid of power of regulation unless the area is one where of necessity federal regulation is required. And even where Congress has acted, local regulation is not precluded unless Congressional intention is shown to supersede or exclude state action.

Cases involving the reconciliation of local regulation with federal regulation where Congress has acted are undoubtedly extremely vexacious and there is no need here

to attempt a detailed discussion of all the problems this Court has faced in this field. The question was thoroughly discussed in *Cloverleaf Butter Co. vs. Patterson*, 315 U. S. 148, 62 S. Ct. 491, where the Court pointed out, 315 U. S. at 155:

> "It has long been recognized that in those fields of commerce where national uniformity is not essential, either the state or federal government may act. Willson vs. Black-bird Creek Marsh Co., 2 Pet. 245, 7 L. Ed. 412; California vs. Thompson, 313 U. S. 109, 114, 61 S. Ct. 930, 932, 85 L. Ed. 1219. Where this power to legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the nation. But where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application.
>
> "When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation."

In *Currin vs. Wallace*, 306 U. S. 1, 59 S. Ct. 389, which involved the superseding of local regulation of tobacco auctions by the Federal Tobacco Inspection Act of August 23, 1935, the Court said, 306 U. S. at 12:

> "Inspection and the establishment of standards for commodities has been regarded from colonial days as appropriate to the regulation of trade, and

> the authority of the States to enact inspection laws is recognized by the Constitution, Art. I, Sec. 10, Cl. 2. (cases cited) But the inspection laws of a State relating to exports as to articles purchased for shipment to other States are subject to the paramount regulatory power of Congress."

This Court has, for example, upheld state regulation requiring that feed moving into a state bear labels stating its components in addition to labels required by federal regulation. *Savage vs. Jones*, 225 U. S. 501, 32 S. Ct. 75; and it has upheld a state regulation that cattle being shipped into a state be accompanied by a certificate that they were from herds free of Bang's Disease as well as the certificate, required by the federal Cattle Contagious Disease Acts, that the animals themselves were free of the disease. *Mintz vs. Baldwin*, 289 U. S. 346, 53 S. Ct., 611. In the latter case the Court stated, 289 U. S. at 350:

> "The purpose of Congress to supersede or exclude state action against the ravages of disease is not lightly to be inferred. The intention so to do must definitely and clearly appear."

In the case at bar no action has been taken by Congress to set any standards for, or to regulate the flow of, fluid milk, raw or pasteurized, in interstate commerce. As pointed out by the Wisconsin Supreme Court, that is a field which Congress has left to local regulation. *Dean Milk Co. vs. City of Madison*, 257 Wis. 308, at 315. Appellant's contention that the movement of "wholesome" milk in interstate commerce cannot be affected by local regulation clearly cannot be sustained.

No standards by which it can be determined whether milk is "wholesome" exist except through local regulations.

There is no federal regulation. Congress has never attempted to set up either the standards or procedures of the United States Public Health Service suggested ordinance or any other standard or procedures for the country in the matter of fluid milk. Even the United States Public Health Service recognized that the acceptance of its suggested ordinance is a matter solely for local determination. Congress has in fact recognized that fluid milk standards and procedures are a matter of local regulation, and in the statutes covering the introduction of milk into the District of Columbia, Congress has provided for the fixing of local standards for the District and for licensing and inspection by the District Health Officer of all milk introduced into the District for fluid purposes and of all plants where it is processed and farms where it is produced, wherever they may be located. (43 Stats., Ch. 358, District of Columbia Code, Title 33, Secs. 33-301 et seq.) Thus, not only has there been no Congressional action to set national standards and procedures, there has been actual recognition by Congress that the setting of standards and requirements of inspection are local matters.

Furthermore, the regulation of fluid milk by federal authority clearly would be entirely impracticable. Unlike meats, vegetables, fruits, etc., where inspectors are not interested in conditions under which the products are raised, it is universally conceded that maintenance of a safe, pure milk supply requires meticulously detailed regulation and constant inspection of all farms where the milk is produced. Federal regulation and inspection thus could not be accomplished by stationing personnel at a relatively few processing plants, as is possible in the case of meats; it would require, in addition, licensing and minute continual inspection of hundreds of thousands of farms scattered throughout the country by federal personnel.

In *Milk Control Board of Pennsylvania vs. Eisenberg Farm Products*, 306 U. S. 346, 352, 59 S. Ct. 528, this Court recognized that the purchasing of milk for out-of-state shipment is "essentially local" in character. Clearly, we feel, the consumption of milk and the regulation of milk for local consumption is even more local in character. If the appellant's position in this case were accepted by the Court, effective local regulation of milk for local consumption would be prohibited; and since there is no federal regulation on the subject, there would be left free of effective regulation all milk flowing in interstate commerce for local consumption. It is submitted that this result would seriously prejudice adequate protection of the public health in the field of fluid milk. The effect of an acceptance of the appellant's contention in this case would be to overturn the entire milk regulatory system which has developed throughout the country based on a local autonomy within reasonable limits for the protection of public health. No showing has been made by appellant that the recognition of this local autonomy has seriously affected interstate commerce dealings in fluid milk. It is submitted that clearly the over-riding interest of the protection of public health out-weighs the interest of those large milk distributing concerns which may be adversely affected by local reasonable health regulations with which they either cannot or will not comply.

Hence it is submitted that the appellant's claim that "wholesome" milk (without any standards being suggested by appellant to determine when milk is "wholesome") cannot be supported; and that, in the absence of federal regulation, the localities should be permitted to continue to establish and enforce their own reasonable standards, and to license and inspect all processing plants and farms which furnished milk to the localities. If the

localities are to continue to have these powers, they are entitled to adopt reasonable means to make their own control measures more efficient and economical. For a city such as Madison, situated in the heart of a milk producing area of tremendous volume, the means adopted by the city as part of its milk regulations in limiting pasteurization to an area within five miles of the city is an appropriate means to the ends in view. If a large milk dealer, such as appellant, proposes to ship milk from one milk-shed to many communities, it is only proper to require it to comply with the reasonable standards of each such community. It clearly would be neither reasonable nor in the interest of public health to require every community to lower its standards as to that dealer to the level of the dealer's own milk-shed to accommodate the dealer's desire to do an extensive business and thus give such dealer an unfair advantage over local dealers who are held to higher standards. Therefore, it is submitted that Madison's five mile pasteurization limit is a legitimate exercise of the local police power for the protection of public health and is not invalid under the Interstate Commerce Clause.

III.

The State Courts Properly Refused to Pass Upon the Validity of Section 7.11 of the Madison Ordinances.

Section 7.11 of the Madison general ordinances is the second section of the ordinances attacked by appellant. It is set out in the Record at pages 245 and 246. It makes unlawful the sale, etc., of milk in Madison from a source not possessing a Madison permit, provides that only persons who comply with the entire ordinance are entitled

to permits and for inspection of the farms by the Madison Health Commissioner prior to issuance of a permit and contains the provision to which appellant objects: "The Health Department shall not be obligated to inspect and issue permits to farms located beyond twenty-five (25) miles from the central portion of the City of Madison, otherwise known as the Capital Square." (R. 246)

As pointed out by the Wisconsin Supreme Court in its statement of the Case (R. 291-292) the trial court required appellant to separate its attacks on Section 7.21 and 7.11 of the ordinances into separate causes of action, so they could be considered separately. They were so separated in appellant's second amended complaint (R. 19-33), being the pleading on which the case was tried. In their answer to the second cause of action in that complaint, which dealt with section 7.11 of the ordinances, appellees denied there was any controversy between the parties as to section 7.11 as long as the five-mile pasteurization limit in section 7.21 remains in effect because appellant at no time has indicated it proposes to pasteurize its milk within the permitted five miles. (R. 50)

At no time in this action has appellant indicated any willingness to comply with the five mile pasteurization requirement. The trial court's decision, which upheld that limit consequently refused to pass upon the validity of section 7.11 (R. 17-18); the findings of fact found appellant did not intend to pasteurize within five miles so it had no rights, status or other legal relations affected by section 7.11 (R. 55); and the Declaratory Judgment ruled there was no justiciable controversy between the parties as to the construction or validity of section 7.11 and consequently dismissed appellant's second cause of action. (R. 58). The State Supreme Court affirmed that judgment. (R. 296)

In its Fourth and Fifth Assignments of Error appellant claims error in the fact that the state courts refused to

pass upon the validity of section 7.11 of the Madison ordinances. In its brief, as basis for this claim of error, the appellant has inaccurately stated the facts. The City of Madison did not deny appellant a permit to sell milk in Madison on the basis of section 7.11 of the ordinance. The denial of permit was in March of 1948 and section 7.11 of the ordinances was not adopted until August of 1949. The City of Madison has not refused to inspect the farms which supply the appellant's milk except on the basis that there was no point in making such inspection as long as the five-mile ordinance remains. The refusal of the City to furnish appellant with 950 applications for farm permits was based on that ground alone. (R. 69) The City has not refused a license to the appellant because its farms do not have permits but solely because appellant does not pasteurize within five miles of the City.

Consequently, as long as the five-mile pasteurization limit remains there is no justiciable controversy between the parties hereto, and the trial court and the Wisconsin Supreme Court so held.

Nothing in this case, if the five-mile pasteurization limit did not exist, would prevent appellant or any of the farmers supplying appellant, from seeking a determination in the Wisconsin courts of the validity of the twenty-five mile inspection provision if the City should refuse to inspect the farms. The cases cited by appellant in support of its claim that the refusal of the state courts to pass upon the twenty-five mile inspection provision denies it its rights all involve situations where there had actually been a determination of the issues by a court. Where there has been a determination by a court, unless an appeal is taken, or where the case has become moot during the course of an appeal, failure to secure reversal on an appeal leaves the original determination in effect. But this doctrine in no way applies where there has never been any determination

by a court, which is the situation in this case. This principle is shown in the decision of this Court in *United States of America vs. Munsingwear, Inc.*, decided by this Court November 13, 1950.

It is therefore submitted that so long as the five-mile limitation of section 7.21 of the ordinance stands and so long as the appellant has no intention of pasteurizing its milk within five miles of Madison, there is no justiciable controversy between the parties on the question of the twenty-five mile inspection provision in section 7.11 of the ordinances; and the state courts properly so held. That determination by those courts does not in any way prevent a proper party from contesting the validity of that ordinance in the future. Therefore, it is submitted there is no reason for this court to reverse the refusal of the state courts to pass upon the validity of section 7.11

CONCLUSION.

It is therefore respectfully submitted that the judgment of the Wisconsin Supreme Court which affirmed the validity of section 7.21 of the Madison Ordinances and which affirmed the judgment of the trial court refusing to pass upon the validity of section 7.11 because of the lack of justiciable controversy between the parties should be affirmed.

Respectfully submitted.

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APPENDIX

Excerpts From
Wisconsin Department of Agriculture,
General Order 125, entitled

"Standards and Regulations for the Production and Processing of Milk and Milk Products for Interstate Shipment."

* * * * *

It is ordered, that the following standards and regulations for the production and processing of milk and milk products for interstate shipment are hereby established and prescribed, effective November 15, 1949.

* * * * *

3.01. Any person who makes application on a form prescribed and furnished by the Department, who subscribes to this regulation, who pays the prescribed fees and who is approved by the Department may participate in this plan. Upon approval, a permit will be issued to the applicant by the Department.

3.02. Participation in this program is voluntary. Only a person who complies with the provisions of this regulation shall be entitled to receive and retain a permit authorizing participation.

* * * * *

11. Out-of-State Markets.

11.01. No person holding a permit and participating in this program, or holding a permit and participating in a similar program pursuant to the provisions of a substan-

tially equivalent regulation under the supervision of a duly authorized health department as provided in section 17.03 hereof, shall sell or offer to sell any milk or milk products to any milk plant or milk distributor in any out-of-state market operating under the United States Public Health Service Code unless its compliance and the compliance of its producers with the provisions of this regulation and with the corresponding provisions of the United States Public Health Service Code as determined by United States Public Health Service rating meet the minimum standard maintained by such out-of-state markets.

* * * * *

17. Scope of Regulation.

17.01. None of the provisions of this regulation shall be construed to apply to any person who has not voluntarily agreed to participate in the program for continuous inspection for interstate markets as herein provided unless he shall by label, statement, design or device or other representation in any manner attempt to induce a prospective customer to believe that the milk or milk products sold, offfered or exposed for sale, or in his possession or under his control have been produced and/or processed in conformity with the requirements of this regulation.

* * * * * *

18.02. Persons holding a permit and engaging in milk production and/or processing operations desiring to qualify under this regulation shall agree to pay to the state the cost of such inspection service at rates to be established from time to time by the Department; *Provided*, That the cost of the inspection service rendered to individual producers shall be paid by plants processing and/or distributing such milk and the milk products made therefrom.